92-21

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1991

KENDALL STOCKSTILL AND
MANUEL T. MAYEUX,

Petitioners,

v.

SHELL OIL COMPANY AND
COASTLINE CONSTRUCTION COMPANY

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Notice of Appeal which names the parties to the appeal in the caption of the Notice and further designates the parties by their individual case numbers in the body of the notice is sufficient to give fair notice of the individuals seeking the appeal and invoke the Appellate Court's jurisdiction.

2. Whether a second Notice of Appeal is necessary subsequent to the District Court's F.R.C.P. 54(b) Order when the appellants filed no motions after filing their first Notice of Appeal pursuant to F.R.A.P. 4(a)(2)(4).

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this proceeding.

Kendall Stockstill	– Petitioner
Manuel T. Mayeux	– Petitioner
Shell Oil Company	– Respondent
Coastline Construction Company	– Respondent

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No. _____

In The

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KENDALL STOCKSTILL AND
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SHELL OIL COMPANY AND
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OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on September 4, 1991. The U.S.

Court of Appeals for the Fifth Circuit's denial of rehearing was rendered on March 30, 1992. Therefore, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

28 U.S C. Section 1254(1)

Federal Rules of Appellate Procedure 4(a)(2)(4)

Federal Rule of Civil Procedure 54(b)

STATEMENT OF THE CASE

Petitioners, KENDALL STOCKSTILL and MANUEL T. MAYEUX, were discharged by respondent COASTLINE CONSTRUCTION COMPANY (hereafter "Coastline"), at the request of SHELL OIL COMPANY (hereafter "Shell"). Although Coastline was the last one of a number of contractors the plaintiffs had worked for, petitioners had worked at Shell's East Bay facility for over 12 and 23 years respectively. Both petitioners are in the protected age group and were qualified for the positions they held.

For good reasons and belief, petitioners filed charges with the Equal Employment Opportunity Commission. Upon receipt of their right to sue letters, both petitioners filed separate complaints against the respondents alleging age discrimination and violation of the employment Retirement Income Security Act. On motion by respondent, Shell, the court consolidated the cases on April 22, 1991.

On June 24, 1991, petitioner KENDALL STOCKSTILL filed a separate complaint in State Court against respondent SHELL alleging defamation. The respondent, SHELL, then removed the State claim to Federal Court and consolidated the action with the previous complaints.

Thereafter, on July 16, 1991, respondents filed a motion for summary judgment which the court granted on September 4, 1991. The judgment, however, was only effective against the first two original complaints and did not affect the separate defamation claim filed by petitioner KENDALL STOCKSTILL.

The petitioners then filed a request for rehearing on September 19, 1991. The motion for rehearing was subsequently denied on October 10, 1991. Thereafter, a notice of appeal by petitioners was filed with the district court on October 16, 1991. Subsequent to the filing of the notice of appeal, the district court entered a partial judgment under Rule 54(b) on November 7, 1991.

On February 28, 1992, the Fifth Circuit Court of Appeals rendered a judgment dismissing petitioners' appeal for lack of jurisdiction. The reason assigned for the dismissal was that the notice of appeal was ineffective for failure to designate the parties taking the appeal. Furthermore, the Appellate Court stated that a notice of appeal filed prior to the entry of a Fed. R. Civ. P. 54(b) order was ineffective and required a second Notice of Appeal to be filed.

Petitioners' sought a rehearing in the Appellate Court on September 19, 1991. However, on March 30, 1992, the Court of Appeals for the Fifth Circuit denied the petition for rehearing.

ARGUMENT

In dismissing the petitioners' appeal for want of jurisdiction, the Appellate Court cited two reasons: failure to designate the parties taking the appeal, citing *Torres v. Oakland Scavenger Company,* 1085 S. Ct. 2405 (1988), and the failure to notice the appeal after entry of a Fed. R. Civ. P. 54(b) order, citing *Dibidale of Louisiana, Inc. v. American Bank and Trust Company,* 916 F.2d 300 (5th Cir. 1990). However, the decision to decline jurisdiction based upon those authorities is a departure from the reasoning of *Torres,* supra, and *Dibidale,* supra, as well as Fed. R. App. P. 4(a)(2)(4).

This Court in *Torres,* supra, held that the notice of appeal was ineffective to *Torres* inasmuch as his name was not among the other fifteen appellants' names in the caption of the notice or in the body of the Notice of Appeal. Furthermore, this Court stated that the requirements of the rules on Notice of Appeal are met by some designation that gives fair notice of the individuals seeking to appeal. Even if the Notice of Appeal filed by petitioner was not written as to the form provided in the Federal Rules of Appellate Procedure, this Court has held that a Notice of Appeal, although unartfully written should be considered the functional equivalent of a technically correct notice. *Torres,* supra, *Foreman v. Davis,* 371 U.S. 178, 83 S. Ct. 227 (1962), *Houston v. Zack,* 108 S. Ct. 2379 (1988).

In the case at bar, the notice of appeal filed by the petitioners contained both petitioners' names in the caption. Moreover, in the body of the Notice of Appeal, the individual case numbers assigned to the petitioners were

listed. (App. D). Although the Notice of Appeal was not technically correct, both petitioners' intention to seek review was manifested by naming both petitioners in the caption and by the designation of each petitioner by his case number.

It is also noteworthy that counsel for petitioners had previously filed a Notice of Appeal in a previous case, *G. Alfred v. United Parcel Services, Inc., et al.*, CA-91-3527 (5th Cir. 1992) on June 18, 1991. (App. E). In that case, the same styled Notice of Appeal was issued. However, not only did the Appellate Court accept the notice filed in *Alfred*, id, but the Appellate Court also entertained oral argument. Counsel for petitioners merely relied, to petitioners' detriment, on the fact that the Notice of Appeal was sufficient inasmuch as the Appellate Court accepted the same styled Notice of Appeal in a previous case.

The Appellate Court's second reason for declining jurisdiction was that the Notice of Appeal was filed prior to the entry of the Fed. R. Civ. P. 54(b) Order. However, the Appellate Court's decision is erroneous. According to Federal Rules of Appellate Procedure 4(a)(2) it states that "[e]xcept as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of judgment or order *shall* be treated as filed after such entry and on the day thereof" (emphasis added). The provisions of 4(a)(4) do not address the Rule 54 Order. The rule only applies to the disposition of post trial motions filed under Rule 50(b), Rule 52(b), and Rule 59. Moreover, the petitioners did not file any motions after the motion for a rehearing on September 19, 1991. The Rule 54(b) order was issued upon the Court's motion, not that of the petitioners.

The Appellate Court cited *Dibidale*, supra, as authority for the requirement of a second Notice of Appeal. However, the cases are distinguishable. In *Dibidale*, supra, the petitioner filed his notice of appeal with the Appellate Court. Subsequent to that filing, petitioner filed a motion for reconsideration. The court stated that by filing the motion the notice of appeal was ineffective but the defect was cured by a second notice filed post-argument. The court did not hold that a notice must be filed after a Rule 54(b) order to comply with Fed. R. App. P. 4(a)(2).

An understanding of Fed. R. App. P. 4(a)(2)(4) and this Court's holding in *Torres*, supra, clearly shows that the Appellate Court's decision in this case is contrary to both the Federal Rules of Appellate Procedure and the decisions of this Court.

CONCLUSION

For all the above and foregoing reasons this Court should remand this case to the Court of Appeals for the Fifth Circuit instructing it that it has jurisdiction to hear the appeal of petitioners.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3885
Summary Calendar

KENDALL STOCKSTILL,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

MANUEL T. MAYEUX,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-3259-J & 90-3260-J)

(February 28, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

We dismiss the appeal for want of jurisdiction. A notice of appeal was filed on October 16, 1991, but it was ineffective for two reasons: It fails to designate the party or parties taking the appeal, *see Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988), and it was filed prior to the entry of a Fed. R. Civ. P. 54(b) order that provided the parties with an appealable judgment, *see Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300, 304 (5th Cir. 1990).

In their reply briefs, the appellants claim that they filed a second notice of appeal on November 20, 1991, which was after the entry of the rule 54(b) judgment. But the district court has never received any such subsequent notice of appeal (even assuming that such notice would have satisfied the requirements of *Torres*). The appellants had thirty days from the entry of the rule 54(b) judgment to file an effective notice of appeal. As they have not done so, the appeal is DISMISSED for want of jurisdiction.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3885

KENDALL STOCKSTILL,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

MANUEL T. MAYEUX,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 30, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MANUEL T. MAYEAUX	CIVIL ACTION
VERSUS	No. 90-3259 c/w 90-3260 and 91-2527
SHELL OIL COMPANY and COASTLINE CONSTRUCTION, INC.	Section "J"

(Filed Nov. 7, 1991)

Partial Judgment under Rule 54(b)

Considering the Judgment entered in Civil Action No. 90-3260 on September 4, 1991,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Shell Oil Company and Coastline Construction, Inc., and against the plaintiff, Manuel T. Mayeaux, dismissing with prejudice the latter's suit in Civil Action No. 90-3260 at his cost.

This partial judgment is entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court having expressly determined that there is no just reason for delay in the entry of judgment as to Civil Action No. 90-3260 only.

New Orleans, Louisiana, this 6th day of November, 1991.

/s/ Patrick E. Carr
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY NOV. 8, 1991

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KENDALL STOCKSTILL AND MANUEL MAYEUX	*	CIVIL ACTION
	*	No. 90-3259
	*	c/w 90-3260
VERSUS	*	c/w 91-2527
SHELL OIL COMPANY and COASTLINE CONSTRUCTION COMPANY	*	Section J (4)
	*	(Filed Oct. 18, 1991)
	*	

NOTICE OF APPEAL

(This notice relates to civil action No. 90-3259 and 90-3260 only)

I hereby request an appeal be noticed in the above captioned matter.

/s/ Dan M. Scheuermann
Dan M. Scheuermann
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Bar Roll No. 11767
405 St. Ferdinand Street
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ATTACHMENT 1

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GUERNEY ALFRED

VERSUS

UNITED PARCEL SERVICE, INC., ET AL

CIVIL ACTION
NO. 89-876-A

NOTICE OF APPEAL

I hereby request an appeal be noticed in the above captioned matter.

/s/ Dan M. Scheuermann
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